IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-533

In re the Marriage of ANGELA
and JESS H. HISQUIERDO.

JESS H. HISQUIERDO,

Respondent,

vs.

ANGELA HISQUIERDO,

Appellant.

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF CALIFORNIA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Jess H. Hisquierdo, hereby petitions for a writ of certiorari to review the decision of the Supreme Court of the State of California holding that Petitioner's future entitle-

ment to Federal Railroad Retirement Benefits as provided under 45 USC 231, et seq., is community property and subject to division upon the dissolution of marriage.

OPINIONS BELOW

The opinion below on the original decision is reported at 19 C.3d 613, 139 Cal. Rptr. 590, 566 P.2d 224. It is appended hereto as Appendix A.

JURISDICTION

The order sought to be reviewed was made and entered on July 12, 1977. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 USC 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether there is any property, community or otherwise, right

to the entitlement of Federal Railroad Retirement benefits.

2. Whether a spouse divorced from an employee, who works in a railroad connected occupation, is entitled to any benefits under the Railroad Retirement Act.

3. Whether the purpose of the Railroad Retirement Act precludes a divorced spouse from any entitlement to a portion of her ex-husband's future benefits.

STATEMENT OF CASE

The parties herein had been married 13 years and 10 months. Petitioner had been engaged in railroad connected employment prior to, during, and subsequent to his marriage and had accumulated future benefits under the Railroad Retirement Act. His wife was also

employed and had accumulated benefits under the Social Security Act.

The trial court held at the interlocutory hearing that there was no community property interest to Petitioner's rights to future Railroad Retirement benefits. The intermediate State appellate court affirmed, but the California Supreme Court reversed the trial court's decision.

The federal question raised, initially at the trial level, was as follows:

Whether the Congessional intent in establishing the right to Railroad Retirement benefits is violated by awarding a divorced spouse a community property interest in her ex-husband's rights to those benefits.

The California Supreme Court

held no such violation.

The California Supreme Court also failed to hold that the social security insurance program established under the Social Security Act is similar to that of the Railroad Retirement Act, and thereby held that there existed a property right to the Railroad Retirement benefits.

POINT I

THERE IS NO PROPERTY RIGHT, COMMUNITY OR OTHERWISE, TO THE FUTURE ENTITLEMENT OF FEDERAL RAILROAD RETIREMENT ACT BENEFITS

This Court in discussing Social Security benefits held that "an expectations of public benefits does not confer a contractural right." Richardson v. Belcher, 404 U.S. 78, 80-81, 92 S. Ct. 254 (1971).

This Court, further, described

social security system as a "social insurance" program whereby those who are presently gainfully employed are taxed in order to pay benefits to those who are currently retired. Fleming v. Nestor, 363 U. S. 603, 609-610, 80 S. Ct. 1367 (1960).

As to Railroad Retirement benefits, the same effect has been held, that the rights thereunder are statutory and that there are no contractural rights thereto. Ruhl v. Railroad Retirement Board, 342 F.2d 662; cert. denied 382 U. S. 836, 86 S. Ct. 81 (1965).

Pension rights in California are a community asset to the extent they represent "an element of her husband's contractural compensation and is earned by performance of services." Benson v. City of Los Angeles, 60 C.2d 355, 359,

33 Cal. Rptr. 257, 384 P.2d 649 (1963).

It therefore follows that since there can be no contractural elements of deferred compensation to the Railroad Retirement benefits, there are no community property rights thereto.

In all the cases that counsel herein has read, in which a retirement benefit was held to be community property, there existed a relationship of employee and employer under which the benefits were conferred.

POINT II

THE SPOUSE DIVORCED FROM AN EMPLOYEE, WHO IS EMPLOYED IN A RAILROAD CONNECTED OCCUPATION, IS NOT ENTITLED TO ANY BENEFITS UNDER THE RAILROAD RETIREMENT ACT

Congress in enacting the Railroad Retirement Act, specifically provided that a divorced spouse's rights are

terminated. 45 USC 231d(c)(3)(B). To hold that the divorced spouse is still entitled to a portion of the ex-spouse's benefits interferes with the specific intent of Congress that any such entitlement is terminated when the parties are absolutely divorced.

In Wissner v. Wissner, 338 U. S. 655 (1950) this Court held that where the federal law and state law conflict, the state law must yield. Congress has not only expressed its intent as to the termination of rights of a divorced spouse, but has also stated that the railroad connected employee's benefits cannot be assigned or in any way anticipated. 45 USC 231m. Thus the federal law must prevail to the effect that there are no community property rights to the

railroad connected employee's benefits.

It was just on such a principle that the State of Texas, the only other state to this counsel's knowledge to rule on this issue, decided that there were no community property rights to Railroad Retirement benefits. Allen v. Allen,(Texas), 363 S. W.2d 312 (1962).

POINT III

THE PURPOSE OF THE RAILROAD RETIREMENT ACT PRECLUDES A DIVORCED SPOUSE FROM ANY ENTITLEMENT TO HER EX-HUSBAND'S FUTURE BENEFITS

When the Railroad Retirement Act was first enacted in 1937, there were few, if any, provisions for the retirement of workers. Those who could no longer work were merely discarded. The purpose of the Railroad Retirement Act, and its counterpart the Social Security Act, was to provide those who had provided

a minimum number of employed quarters, a retirement income. To take away as much as half of that retirement income will defeat the Congressional purpose. It may prevent, in many cases, the ability of those who have reached the age of retirement from being able to retire andwe will be back to where we were before the enactment of the legislation. By this conclusion, counsel does not mean to imply that the divorced spouse should be left destitute. The trial courts have the right to rely on retirement income to determine the ability of the recipient to pay spousal support (alimony). Thus, the division could be meted out with judicial discretion based on ability and need and not arbitrarily by some precomputed formula.

As an example, in the within

case, Petitioner's ex-wife will have all of her social security on which to rely on her retirement, In re Marriage of Nizenkoff, 65 C. A.3d 136 (1977), and, if the within case rule is not reversed, also a substantial portion of the Petitioner's railroad retirement. While Petitioner will have less than the full sum of his retirement on which to rely after he has reached his retirement years.

CONCLUSION

This Court should grant certiorari, and the judgment below should be reversed.

Respectfully submitted,

JAMES D. ENDMAN
Attorney for
Petitioner

APPENDIX A - OPINION OF THE SUPREME COURT OF CALIFORNIA

C O P Y

SUPREME COURT
FILED
JUL 12 1977
G.E.BISHEL, Clerk

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re the Marriage of ANGELA and JESS H. HISQUIERDO. JESS H. HISQUIERDO, Respondent, v. ANGELA HISQUIERDO, Appellant.	L.A.30712 (Super. Ct. No. D860954

We are called upon to decide whether benefits afforded by the Railroad Retirement Act (45 U.S.C. § 231 et seq.) are community property.[1/]

Jess and Angela Hisquierdo were married in 1958 and separated in 1972. Wife was employed throughout the period of the marriage; they had no children. At the

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1/ The Railroad Retirement Act of 1937 (45 U.S.C. § 228a et seq.) was completely revised and amended by the Railroad Retirement Act of 1974, cited above. All references in this opinion are to the later enactment.

time of the dissolution of marriage hearing in 1975, she was 53 years old and husband was 55. He had been employed by the Atchison, Topeka & Santa Fe Railroad from 1942 to 1975, and thereafter by the Los Angeles Union Passenger Terminal. Both of these employments entitle him to retirement benefits under the act when he reaches the age of 60.

In January 1975, husband filed a petition for dissolution of the marriage. The trial court's interlocutory judgment divided the community property by awarding him the residence of the parties, in which there was an equity of $12,828, and furniture and fixtures which had a value of $500. Wife was awarded $100 in a mutual fund, and a 1965 automobile. In order to equalize distribution, husband was ordered to pay wife $6,364, plus interest, in monthly installments. The court refused to grant wife any interest in husband's railroad retirement benefits, or the equivalent thereof, on the ground that she had no community interest in those funds. Wife appeals, contending that the retirement benefits which accrued to husband

during the 13 years of marriage constitute community property, and that the trial court erred in refusing to award her one-half of such benefits.

The United States Supreme Court in Wissner v. Wissner (1950) 338 U.S. 655, held that California's community property law could not be applied to the proceeds of a policy for National Service Life Insurance, claimed by a widow who was not the beneficiary of the policy, because Congress had made it plain, by providing for the insured serviceman's right to change the beneficiary, that the proceeds belong to the beneficiary designated by the insured. In California, retirement benefits resulting from employment during marriage are community property, subject to division in the event of dissolution of the marriage. (Waite v. Waite (1972) 6 Cal.3d 461, 470 (overruled on other grounds in In re Marriage of Brown (1976) 15 Cal.3d 838, 851, fn. 14).) Several recent decisions have held that pension rights created under federal law constitute community property to the extent that they are attributable to employment

during marriage. (E.g., In re Marriage of Fithian (1974) 10 Cal.3d 592; In re Marriage of Smith (1976) 56 Cal.App.3d 247; Bensing v. Bensing (1972) 25 Cal.App.3d 889; In re Marriage of Karlin (1972) 24 Cal.App.3d 25; but see In re Marriage of Brown (1976) 15 Cal.3d 838, 851, fn. 14.)

The principle that has emerged from these decisions is that whenever there is a conflict between a federal statute affording annuity or insurance benefits and state community property laws the federal statute must prevail. However, if the intent of Congress in creating the federal right is not violated by application of California's community property laws, then the status of such rights is governed by California law. (See, e.g., Fithian, 10 Cal.3d at p. 598; In re Marriage of Milhan (1974) 13 Cal.3d 129, 132.) Our task, then, is to determine whether Congress intended that railroad retirement benefits remain the separate property of the employee.

Husband relies upon various provisions of the act as indicating an intent by Congress to render annuities payable

thereunder the separate property of the spouse whose employment is covered by the act. He first quotes the following provision contained in section 231m: "Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated . . . ." (Italics added.)

This provision, with the exception of the clause italicized, is substantially similar to other statutes placing federal and state retirement or insurance benefits beyond the grasp of creditors. (E.g., 10 U.S.C. § 1440 (military annuities); 38 U.S.C. § 3101 (veteran's benefits); Gov. Code, § 21201 (retirement annuities for state employees).) Such statutes do not prevent a pension from being treated as community property, for as was said in Phillipson v. Board of Administration (1970) 3 Cal.3d 32, 44, "Plaintiff [wife] . . . claims not as a creditor, but as an

owner with a 'present, existing, and equal interest.' [Citations omitted.] The recognition of an ownership claim cannot be described as the levy of execution, garnishment, attachment or assignment of property."2/

The prohibition against anticipation of payment of railroad retirement benefits

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2/ Wissner relies upon an exemption clause prohibiting the "seizure" of proceeds of National Service Life Insurance as justification for its conclusion that the designated beneficiary of the policy may not be compelled to pay one-half of the proceeds to the widow as her share of the community property. As we read Wissner, this determination was based upon the court's conclusion that to allow the widow to "capture" the proceeds would frustrate Congress' intent to assure that the serviceman had the right to designate the recipient of the insurance. (338 U.S. at p. 661.) In a number of cases, despite the existence of creditor exemption statutes similar to the one involved here (10 U.S.C. § 1440), California has treated federal annuities as community property (e.g., Fithian; In re Marriage of Smith, supra, 56 Cal.App.3d 247; Bensing v. Bensing, supra, 25 Cal.App.3d 889; In re Marriage of Karlin, supra, 24 Cal.App.3d 25.) In Fithian the United States Supreme Court denied certiorari. (421 U.S. 976.)

in section 231m does not alter this conclusion. The purpose of that provision is to assure that railroad annuities not yet paid to the beneficiary are exempt from the claims of creditors. The clause is the functional equivalent of the prohibition against attachment of veteran's benefits "either before or after receipt by the beneficiary" (38 U.S.C. § 3101(a)), and was not designed to alter the essential purpose of section 231m, i.e., to bar creditors of the beneficiary from reaching annuity payments, rather than to prevent a spouse from vindicating her ownership interest in the pension.

Husband next asserts that the act provides a spouse (or widow/widower) with a right to benefits which are separate and distinct from the benefits accorded to the railroad employee, and that the intent of Congress in granting separate benefits would be frustrated by treating the employee's pension as community property. He points to provisions of the act which grant a separate annuity to a spouse who reaches a certain age and meets other qualifications. (45 U.S.C. § 231a(c)(1)

and (3).) The spouse's annuity terminates upon divorce. (45 U.S.C. § 231d(c)(3)(B).)[3/] A widow or widower is also entitled to an annuity. (45 U.S.C. § 231a(d)(1)(i).)

In circumstances in which the surviving spouse of a deceased employee is entitled to a separate annuity, our holding in Fithian provides the answer. There, in reply to an assertion of the husband that Congress did not intend a military retirement pension to constitute community property because it had created an annuity plan for widows but not ex-wives, we stated, "The point is not persuasive. Congress' concern for the welfare of soldiers' widows sheds little light on Congress'

3/ Husband mistakenly asserts that a congressional intent to terminate a divorced spouse's right in the railroad employee's pension is demonstrated by the provision of section 231d(c)(3)(B) that a spouse's entitlement to an annuity shall end upon divorce. However, as the section makes clear, the provision refers not to any interest the spouse may have in the employee's pension but in the separate benefits granted the spouse under the act.

attitude toward the community treatment of retirement benefits, particularly since those benefits do not survive the serviceman regardless of his marital status at death. It is not incongruous for Congress to supply a program to aid widows, who no longer have husbands to provide sustenance, and omit to do so for ex-wives who can rely on state family law concepts of support, alimony, and community property for a source of income." (10 Cal.3d at p. 600.)

The mere fact that distinct benefits are provided by the act for the retired employee and his spouse (or widow/widower) does not indicate an intention that the employee's annuity should be separate property. To accede to such proposition would imply Contress intended that although a spouse is entitled to both a separate annuity and the support of the railroad employee during marriage, both of these benefits are withdrawn upon divorce. It seems unlikely that Congress proposed to leave a divorced spouse without any assistance whatever stemming from the employee's entitlement to a pension

during marriage. Rather, as in Fithian, the fact that Congress made no provision for a former spouse in the act is more rationally explained by its reliance upon state property law to protect an ex-wife's interest in the railroad employee's annuity.

Husband also contends that railroad retirement benefits under the act are similar in many respects to National Service Life Insurance proceeds and that, therefore, his annuity should, like the insurance proceeds in Wissner, be held to constitute his separate property. But, as we note above, the fundamental premise of Wissner was that Congress intended a serviceman to have an absolute right to change his beneficiary and that to require the designated beneficiary to pay over the proceeds of the policy to the widow would frustrate that intent. Husband does not point to any similar provision in the railroad retirement act. In any event, as we held in In re Marriage of Milhan, supra, 13 Cal. 3d 129, 133, Wissner does not prohibit a court from evaluating the community interest in a military life policy and awarding the wife of the insured spouse an

equivalent amount in other property available for distribution.

Nor are we persuaded by husband's analogy to benefits payable under the Social Security Act. (42 U.S.C. § 401 et seq.) He claims that the right to railroad retirement pensions is a statutory right granted by Congress, not a contractual benefit awarded for services rendered and that, therefore, his pension does not constitute community property. He declares that the act is in many respects similar to the Social Security Act, that the two pension systems are coordinated with one another, that social security annuities have been held to be statutory rather than contractual in nature (Flemming v. Nestor (1960) 363 U.S. 603, 611), and therefore a similar result must follow with respect to railroad retirement pensions.

The foregoing proposition is unsupported by authority. Although there are some similarities between social security benefits and railroad retirement pensions, the same may be said regarding military

retirement pensions which we held in Fithian and its progeny to constitute community property. Thus, we are not convinced by husband's argument.

Finally, husband relies upon a Texas case which holds that in a divorce action a wife may not be awarded a portion of her husband's railroad retirement pension when such benefits are not due until some future date. (Allen v. Allen (Tex.Civ. App. 1962) 383 S.W.2d 312.) We do not find Allen persuasive for all the reasons discussed herein. (Compare In re Marriage of Brown, supra, 15 Cal.3d 838, 851.)

The judgment is reversed and the cause is remanded to the trial court for disposition of property in a manner consistent with this opinion.

MOSK, J.

WE CONCUR:

BIRD, C.J.
TOBRINER, J.
CLARK, J.
RICHARDSON, J.
MANUEL, J.
*SULLIVAN, J.

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council